

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 172

Docket No. CH-315H-09-0408-I-1

**Sherry L. Barrand,
Appellant,**

v.

**Department of Veterans Affairs,
Agency.**

August 28, 2009

Ralph Anderson, Fort Wayne, Indiana, for the appellant.

Tami R. Nantz, Esquire, Indianapolis, Indiana, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that dismissed her appeal for lack of Board jurisdiction. We DENY the petition for failure to meet the review criteria set forth at 5 C.F.R. § 1201.115(d). We REOPEN the appeal on our own motion under 5 C.F.R. § 1201.118, however, AFFIRM the initial decision as MODIFIED, and still DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 The appellant filed a Board appeal, indicating that she was a non-preference eligible competitive service employee terminated during her initial

probationary period, and that her total length of federal service was 5 months. Initial Appeal File (IAF), Tab 1 at 1-2. She attached a copy of the agency's notice of termination, which informed her that she could appeal her termination to the Board if she believed that it was based on discrimination because of marital status or partisan political reasons. *Id.* at 6-7. The appellant requested a hearing. *Id.* at 2.

¶3 The administrative judge issued an acknowledgment order, advising the appellant that, due to her probationary status and length of service, she had limited Board appeal rights. IAF, Tab 2 at 2. She advised the appellant of how to establish jurisdiction over her appeal under 5 C.F.R. § 315.806, ordered her to file evidence and argument on the issue, and informed her that she would not receive her requested hearing unless she made a nonfrivolous allegation of Board jurisdiction under that section. *Id.* at 2-3. The appellant responded, arguing essentially that the Board should exercise jurisdiction over the appeal because the agency's action lacked merit. IAF, Tab 7.

¶4 The agency's response to the acknowledgment order included the SF-50 documenting the appellant's appointment. IAF, Tab 6, Subtab 4B at 3-4. The SF-50 showed that the appellant's career-conditional appointment was to the excepted service position of Medical Instrument Technician under the agency's 38 U.S.C. § 7401(3) appointing authority. *Id.* The agency's response also confirmed that the appointment was subject to a 1-year initial probationary period, and that the appellant was a non-preference eligible individual with 5 months of federal service at the time of her termination. *Id.* at 1, 3-4.

¶5 The administrative judge then issued a show cause order, stating that there was an additional jurisdictional issue:

The agency supplied evidence that revealed the appellant was appointed to an **excepted** service position under 38 U.S.C. § 7401(3). The Board has held that employees appointed under 38 U.S.C. § 7405(a)(1)(A)&(B) (West 2002 & Supp. 2508) are excluded from

coverage under the civil service laws, rules, and regulations. The Board may not have jurisdiction over the action you are appealing.

IAF, Tab 10 at 1 (emphasis in the original). She ordered the appellant to file evidence and argument on the matter. *Id.* The appellant filed a response, arguing that her termination was arbitrary and in violation of the applicable collective bargaining agreement. IAF, Tab 11 at 1.

¶6 The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction without a hearing. IAF, Tab 12 (ID) at 1, 4. She found that the appellant’s appointment under 38 U.S.C. § 7401(3) was made “without regard to civil service law,” and that “the appellant is not an ‘employee’ under chapter 75 with appeal rights to the Board because the agency hired her under Title 38.” ID at 2-3.

¶7 The appellant has filed a petition for review, once again arguing that her termination lacked merit and was in violation of the applicable collective bargaining agreement. Petition for Review File (PFRF), Tab 1 at 2. In support of her petition, the appellant has filed some discovery-related documents, *id.* at 3-7, and various documents relating to the merits of the agency’s action, *id.* at 8-40. The agency has filed a brief response, arguing that the initial decision was correctly decided. PFRF, Tab 3 at 1-3.

ANALYSIS

¶8 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F.2d 9, 10 (Fed. Cir. 1985). Only an “employee,” as defined under 5 U.S.C. chapter 75, subchapter 11, can appeal to the Board from an adverse action such as a removal. *Hartman v. Merit Systems Protection Board*, 77 F.3d 1378, 1380 (Fed. Cir. 1996); *Lamberson v. Department of Veterans Affairs*, 80 M.S.P.R. 648, ¶ 33 (1999); *see* 5 U.S.C. §§ 7511(a)(1), 7512(1). An appellant bears the burden of establishing Board jurisdiction by a preponderance of the evidence. *Burgess v. Merit Systems Protection Board*, 758

F.2d 641, 642-43 (Fed. Cir. 1985); *Rosell v. Department of Defense*, 100 M.S.P.R. 594, ¶ 7 (2005), *aff'd*, 191 F. App'x 954 (Fed. Cir. 2006); 5 C.F.R. § 1201.56(a)(2). An appellant is entitled to a jurisdictional hearing only if she makes a nonfrivolous allegation of Board jurisdiction, i.e. an allegation of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter at issue. *Burgess* 758 F.2d at 642-43; *Baldwin v. Department of Veterans Affairs*, 109 M.S.P.R. 392, ¶ 11 (2008).

¶9 In finding that the appellant did not fit the definition of “employee” under 5 U.S.C. § 7511, the administrative judge cited to 38 U.S.C. § 7405(a)(1) for the proposition that “[f]ederal statute permits the agency to employ its medical instrument technicians without regard to civil service law.” ID at 3. Section 7405(a)(1), however, is an appointing authority for temporary appointments; the appellant was appointed under section 7401(3), not section 7405(a)(1). IAF, Tab 6, Subtab 4B at 3-4; *see generally Bouchard v. Department of Veterans Affairs*, 104 M.S.P.R. 686, ¶ 13 (2007) (discussing the difference between sections 7401 and 7405(a)(1)). The Board has found that “[i]ndividuals appointed under 38 U.S.C. § 7401(3) are entitled to the same appeal rights regarding disciplinary actions as individuals appointed under title 5 of the United States Code.” *Pennington v. Department of Veterans Affairs*, 57 M.S.P.R. 8, 9-10 (1993); *see* 5 U.S.C. § 7511(b)(10); 5 C.F.R. § 752.401(d)(8). The administrative judge, therefore, erred in finding that the nature of the appellant’s appointment precluded her appeal under chapter 75. ID at 3.

¶10 Nevertheless, we find that the appellant fails to meet the definition of “employee” under 5 U.S.C. § 7511 for other reasons. A non-preference eligible individual in the excepted service is an “employee” within the meaning of 5 U.S.C. § 7511 only if she: (1) Is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or (2) has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment

limited to 2 years or less. 5 U.S.C. § 7511(a)(1)(C); *Van Wersch v. Department of Health & Human Services*, 197 F.3d 1144, 1151 (Fed. Cir. 1999).

¶11 The appellant has not presented a nonfrivolous allegation, either below or on review, that she meets these criteria.* Her allegations pertaining to the merits of the agency's action do not address the jurisdictional issue. IAF, Tab 1 at 3, Tab 7, Tab 11 at 1; PFRF, Tab 1 at 2; *see Farris v. U.S. Postal Service*, 101 M.S.P.R. 316, ¶ 7 (2006). The Board must first resolve the threshold issue of jurisdiction before proceeding to the merits of an appeal. *Schmittling v. Department of the Army*, 219 F.3d 1332, 1337 (Fed. Cir. 2000). Likewise, her allegations regarding the agency's alleged breach of the collective bargaining agreement fail to address the jurisdictional issue. IAF, Tab 11 at 1; PFRF, Tab 1 at 2. The appellant's Board appeal rights are determined by the nature of her appointment – not by contract. *See Walton v. Department of the Navy*, 42 M.S.P.R. 244, 250 n.14 (1989); *Bartel v. Federal Aviation Administration*, 14 M.S.P.R. 24, 35-36 (1982), *aff'd as modified*, 30 M.S.P.R. 451 (1986).

¶12 Moreover, the undisputed record evidence shows that the appellant, in fact, has not satisfied the requirements for showing that she is an “employee” within the meaning of 5 U.S.C. § 7511. She does not satisfy the requirements of 5 U.S.C. § 7511(a)(1)(C)(i) because she was not serving in an initial appointment pending conversion to the competitive service. IAF, Tab 6, Subtab 4B at 3-4; *see Forest v. Merit Systems Protection Board*, 47 F.3d 409, 411-12 (Fed. Cir. 1995). She does not satisfy the requirements of 5 U.S.C. § 7511(a)(1)(C)(ii) because she had less than 2 years of federal service to her credit. IAF, Tab 1 at 1, Tab 6, Subtab 4B at 3-4; *see Williams-Hargraves v. Department of Housing & Urban Development*, 88 M.S.P.R. 176, ¶ 14 (2001). The appellant, therefore, was not an “employee” within the meaning of 5 U.S.C. § 7511, and the Board lacks

* The appellant received sufficient notice of the jurisdictional issue. IAF, Tab 2 at 2; ID at 2. *See Easterling v. U.S. Postal Service*, 110 M.S.P.R. 41, ¶ 11 (2008).

jurisdiction over her termination under chapter 75. *See Kukoyi v. Department of Veterans Affairs*, 111 M.S.P.R. 404, ¶¶ 2, 6, 9 (2009).

¶13 Although the administrative judge cited 5 C.F.R. § 315.806 as a possible basis for Board jurisdiction, it appears that she did so based on misleading information in the appellant's appeal form, which indicated that she was a competitive service employee, and in the agency's notice of termination, which stated that the appellant could file a Board appeal if she believed her termination was based on discrimination because of marital status or partisan political reasons. IAF, Tab 1 at 1, 7, Tab 2 at 2-3. The Board need not reach the issue of whether the appellant satisfies the conditions of 5 C.F.R. § 315.806 because that regulation applies only to individuals in the competitive service. *See Allen v. Department of the Navy*, 102 M.S.P.R. 302, ¶ 6 (2006). The Board's jurisdiction cannot be expanded by the agency's erroneous notice of appeal rights. *Campion v. Merit Systems Protection Board*, 326 F.3d 1210, 1215 (Fed. Cir. 2003); *Nabors v. U.S. Postal Service*, 31 M.S.P.R. 656, 660 (1986), *aff'd*, 824 F.2d 978 (Fed. Cir. 1987) (Table). Because the appellant was a non-preference eligible individual in the excepted service, the Board has jurisdiction over her appeal only if she was an "employee" under 5 U.S.C. § 7511(a)(1)(C). *Allen*, 102 M.S.P.R. 302, ¶ 6. Because the appellant does not meet the definition of "employee" under that section, we dismiss the appeal for lack of jurisdiction.

ORDER

¶14 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the

court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.